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## THE RULE OF CONSTRUCTION IN FAVOR OF ASSURED APPLIED IN FRATERNAL INSURANCE.

Judge Lamm of Missouri Supreme Court, in an opinion in Matthews v. Modern Woodmen of America, 139 S. W. 151, quotes from Judge Valliant in Dezell v. Fidelity & Casualty Co., 176 Mo. loc. cit. 265, as follows: "Courts do not favor forfeitures, nor do they favor the defeat of a meritorious cause on any purely technical ground. Insurance companies have probably realized that fact more clearly than any other class of business concerns. * * * And not only have the legislatures exerted their authority in such matters, but the courts of the country also have strained the discretion that lies in the scope of judicial interpretation to prevent a forfeiture of insurance. Sometimes the reasoning of the court in such cases is so technical that to the mind of the layman it but thinly disguises the praiseworthy determination to do justice in that particular case in spite of the letter of the contract."

Judge Lamm follows this up by remarking that: "That language is applicable to both fire and life insurance, nor have we any call to exclude fraternal benefit certificates therefrom. This because, whatever may have been the case at the origin of that form of insurance (when social and fraternal features were far in the ascendancy, from head authority down to local lodge, and insurance a mere incident) those who now propose policies for fraternal societies recognize that insurance is the principal thing, and they have come to imitate old-line insurance companies in ranging about the principal obligation rows of intricate and highly technical exceptions, provisos and limitations, that in the language of Justice Williams in Boyle's Sons v. Insurance Co., 169 Pa. loc. cit. 355, 32 Atl. 556, 'stand bristling like armed sentinels around the contract and the liability of the company thereunder, ready to impale even an honest claimant on a bare technicality.'"

In looking up the case from Pennsylvania we find that the language used by Justice Williams was in reference to a policy in an old-line, and not a fraternal, insurance case, and we doubt not Judge Lamm did not mean that any other impression should be conveyed. But, there was no imitation in that case.

Judge Lamm further says: "The insurance policy in suit is a typical one of its kind. Its elements are drawn from several sources—by-laws, application, etc. The provisions thus brought together in a bundle create ambiguities and seeming contradictions, crying aloud for elucidation and harmonizing. They must be brayed in the mortar of reason with the pestle of good sense."

Then he proceeds to criticise the application, saying: "Presumably the application was the sober and careful handiwork of the defendant," and considering application and benefit certificate as expressing the contract, just as do application and policy in an old-line company, he says the rule of solving ambiguities in favor of the assured should be applied.

Whatever justification there may be for the learned judge's comment upon the difference between fraternal insurance societies now and at the time of their origin we feel scarcely prepared to speak. He may be merely *laudator temporis acti*, as the suns of vanishing years throw a glow over its surface.

But whether his criticism be deserved or not seems to us not to affect the question of the soundness or error of his proposition that the same rule of construction applies to insurance in old-line and fraternal companies.

We state the proposition differently, and to our mind, advisedly so, from the way Judge Lamm does. He compares benefit certificates with insurance policies. We think the comparison should be between old-line insurance and fraternal insurance.

In the latter, the policy is the contract. In the former, compliance with the constitution and by-laws establish and preserve the contract. In old-line insurance there must either be a policy or proof that one should have been delivered, or there will exist no right of recovery. In fraternal insurance a benefit certificate need never be given and, if one is given not in conformity to the constitution and by-laws, to that extent it is *brutum fulmen*. If harder conditions are expressed in a benefit certificate than in the by-laws, an agreement to conform to it is *nudum pactum*. And so, if an application is framed that misrepresents the by-laws, some one's interpretation of the by-laws has simply gone wrong. And, if an applicant tries to conform himself to its requirements there is no consideration binding him to his answers.

We think it could as well be said, that a contract arising out of an application and benefit certificate, which is not warranted by the constitution and by-laws of a fraternal insurance society, would be binding as that it might be said a contract is binding, though it be opposed to public policy as expressed in a statute.

Are not the constitution and by-laws of a fraternal insurance society its statutes? And may its officers write up contracts with its members which are contrary thereto? May these officers relieve members from any obligation these statutes impose? And, contrariwise, may they impose on members what these *statutes* forbid?

If to a member a benefit certificate had never issued and his beneficiary were suing, where would a court go to ascertain the rights and obligations between that member and the society? Could not the court frame a benefit certificate for him that might not correspond at all with the usual form drafted by officers of a society? And which would the court say was a proper certificate?

It should be remembered that these benefit certificates either are prescribed as to form in the by-laws, or they are not. If the former, they are authoritative and should be construed along with other by-laws to ascertain their meaning. If the form is not prescribed, it must be right to reject what is inconsistent with the by-laws, on the principle that some one has attempted to frame a benefit certificate and made a poor job of his effort.

But, if the by-laws and the benefit certificate and the application are consistent, how may the learned judge say they should be construed after the manner that policies in old-line companies are construed?

In the one case members in representative assembly frame a contract *inter sese*, because they are the society. In the other, the parties are at arms' length and one is dictating the terms of a contract which the other accepts. In the one case each member must stand on an equal footing with others. In the other case there may be contracts as variant as the parties thereto may choose to make them.

In the one case there is no pretence of power vested in any officer to admit any applicant to membership, except as he may conform to the requirements members have prescribed for themselves. In the other, there is a business transaction between a business organization and a business man.

If the learned judge will read the constitution and by-laws of any fraternal society to discover what are the powers and duties of its general officers, we venture to say that he will, without the least difficulty, determine, that they are vested with as little discretion in the management of its affairs as it is possible to bestow. And we know he will concede that it is indisputable that the presumption is that members are acquainted with the laws which confine that discretion.

It seems to us, that, when courts are ready to construe a statute, where two citizens are contending about its interpretation, as they construe insurance policies, then, and only then, should they likewise interpret laws which members of fraternal insurance societies have framed to define their mutual rights and obligations.

This would be true whether these societies have departed from their old ideals or not. The laws are still the laws prescribed by their members, and when they wish to alter, amend or repeal them, they have the power.



## NOTES OF IMPORTANT DECISIONS

CARRIER—EJECTION OF PASSENGER FOR ERROR IN ISSUANCE OF TICKET.—The Fourth Circuit Court of Appeals in reasoning that a conductor was not justified in ejecting a passenger, because there was enough upon the face of her ticket to show to what point she had paid her fare strikes us as greatly strained. Baltimore & O. R. Co v. Thornton, 188 Fed. 868.

Its justification may be however in the fact that the only point involved was whether the plaintiff should have sued in contract or in tort, that is to say, if the proof did not show the passenger had a ticket reading to a certain destination the action should have sounded in contract and, if it reasonably so showed, the action was properly laid in tort. The facts show that the ticket was from Newport News "to the station printed thereon, which was punched," but the selling agent failed to punch any station thereon.

The buyer, however, was allowed to check her baggage to the station that should have been punched, and the baggage agent punched "B. C." on the ticket.

The court thus reasons about that: "Conceding that the conductor was under no obligation to accept, as true, plaintiff's statement that she paid $13.75, the fare from Newport News to Parkersburg, or to resort to any other source for explanation of the ambiguity, than was indicated by the ticket itself, we yet think that the ticket contained, upon its face, information which any reasonable man, under the circumstances, would promptly, and without hesitation, have resorted to and accepted as conclusive evidence of the extent of plaintiff's right to travel on the train. The letters "B. C." punched through the ticket, were plain and of unmistakable meaning. It is attached to, and made a part of, the declaration. It is but a reasonable construction of the ticket to treat the check as a part of the evidence of the contract of carriage and to construe them together. The contract to carry the plaintiff included the carriage of her baggage to the same point, and that this was evidenced by the check referred to on the ticket and limited to the destination of the passenger was well known to the conductor. The law imposed upon the defendant the duty to give to plaintiff, upon payment of the prescribed fare, a ticket for herself and check for her baggage, which entitled her to all of the rights and privileges of a passenger. The possession of the check is evidence that she was entitled to go to Parkersburg as a passenger. Moore on Carriers, 548. If, by reason of the negligence of defendant's agent, the ticket was ambiguous or uncertain, it was the duty of the conductor to resort to any source of information on the ticket to explain the ambiguity. 'When, from the circumstances appearing on the face of the ticket and the surrounding circumstances known to the conductor, it is probable that a mistake has been made by the company issuing the ticket, and this probability is so strong that the conductor should, under the circumstances, investigate further before ejecting the passenger,' the ticket cannot be said to be invalid. Kreuger v. Ry. Co., 68 Minn. 445, 71 N. W. 683, 64 Am. St. Rep. 487."

What strikes us as faulty about this reasoning is that, as there was no obligation on the baggage agent to check the buyer's baggage to Parkersburg, this voluntary act or mistake on his part carried no information of a conclusive nature to the conductor.

How does it relieve the ambiguity of the ticket to show that the baggage agent had done something for which there was no warrant on the face of the ticket? This method of proof is "idem per idem."

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MECHANICS' LIENS—MATERIAL USED OR CONSUMED IN A STRUCTURE.—An esteemed contributor referring to note in 73 C. L. J. 293, referring to material in forms for a concrete building, invites our attention to the case of Barker & Stewart Lumber v. Marathon Paper Mills Co., 130 N. W. 866, decided by Supreme Court of Michigan, where the rule is followed that "where the life and substance (of material) have gone into the completed construction," the furnishing gives a lien.

This case, however, applies the principle more liberally than it seems to us it should be applied. Thus it appears that in the building of a coffer dam, about fifty per cent of the lumber was actually consumed. The cost of the lumber was $16 per thousand feet and the fifty per cent remaining was worth something like $5 per thousand. The Wisconsin

court thought that the salvage would amount to a paltry sum. We hardly think this.

The opinion in this distinguished the case from that of Kennedy v. Commonwealth, 182 Mass. 480, 65 N. E. 628, on the ground that there it appeared that the forms to hold concrete in place were used in several other buildings for like purposes. Thus they were like appliances, for which courts are generally agreed there is no lien. But we think this ought not to be the test, but value after use, with lien for depreciation, is the proper criterion for amount of lien. If appliance were the test, in one community there would be one rule and in another, another, merely because building of this variety would be more or less in demand.

The true test is what has been consumed to the loss of the contractor in fulfilling his contract. It may be sure that he estimates for wear and tear of appliances.

## REVISION OF THE FEDERAL EQUITY RULES—REPORT OF COMMITTEE APPOINTED FOR THE SIXTH FEDERAL CIRCUIT.

*To the Chief Justice and Justices Lurton and Van Devanter; Committee on the Revision of the Rules of Practice for the Courts of Equity of the United States:*

In accordance with your announcement, dated June 9, 1911, and our appointment thereunder by the Circuit Court of Appeals for the Sixth Circuit, we submit herewith suggestions of changes which, in our opinion, "would, if adopted, tend to the simplification of pleading and practice and the correction of unnecessary delay and unreasonable cost resulting from practices under the rules as they now exist.

We have put our suggestions into definite shape without attempting to frame complete rules, or to re-cast the present body of rules. They have been in force for seventy years; their meaning has been settled by judicial construction, and it is therefore desirable, in our opinion, to retain them, with such amendments only as are necessary to effect the changes adopted by the Court.

In the course of our consideration of the subject we have held several meetings, have consulted members of the bar with large experience in federal practice, have attended two general meetings of the Committees appointed by the several Circuit Courts of Appeal, and have had the benefit of the advice of the Circuit Judges of the Sixth Circuit.

They approve our suggestions as framed except No. 12. They concur in our recommendation to shorten the intervals between steps, but prefer to accomplish that result by abolishing the rule day, and adopting the theory that the clerk's office is always open, and that procedure should move along without regard to any such arbitrary period. With respect to the trial of cases on oral testimony in open court they suggest that it would be well to minimize in any way that seems practicable the possible tendency of a judge to consider his own disinclination resulting from pressure of business as "good cause" for ordering testimony to be taken in writing.

**Changes in Method of Adducing Evidence and in Mode of Trial.**—1. Provide that equity cases shall stand for trial as soon as they are at issue, and that they shall be tried on oral testimony in open court, and on depositions taken under the act of Congress. Give the court power, on application of a party and for good cause, to order part or all of the testimony to be taken in writing.

This recommendation, which we place first in our list because we deem it the most important, involves the amendment of rules 67 and 69. Rule 69 makes it impossible to get a trial of any equity case until three months after it is at issue, and rule 67 prescribes an expensive, slow and unsatisfactory method of taking the testimony, out of court. It provides that "the court may, at its discretion, permit the whole or any specific part of the evidence to be adduced orally in open court on final hearing." But it has been held that the language "may permit" does not mean "may require" or "may compel" and that the court is therefore without authority to require an unwilling party to adduce his evidence orally in open court.[1] The change which we propose is intended to give the court the necessary authority, and to make oral hearing in open court the rule instead of the exception.

The subject has been discussed at length at general meetings of the committees of the several circuits, and the change seems to be generally approved. The present method of taking testimony and trying equity cases in the federal courts is the principal cause of unnecessary delay and cost. The trial of equity cases on oral testimony in open court is not an experiment; it has long been the regular meth-

(1) Hyams v. Federal Coal & Coke Co., 152 Fed. 970 (1907), C. C. A., 4th Circuit.

od in most of the States in England, and has been found to work satisfactorily.

One member of the committee is of opinion that the parties should be permitted by stipulation, without the approval of the court, to take all or part of the testimony in writing.

2. Add to rule 82 a statement that no case, without consent of the parties, shall be referred to a master before trial by the court, and decree, final or interlocutory.

Such a declaration should be unnecessary, because in Kimberly v. Arms,[2] the court said that it is not competent for a court of equity to refer the entire decision of a case to a master without the consent of the parties, and that the court "can not, of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers." The practice nevertheless continues in some districts of referring cases, as matter of course and without consent of the parties, to a standing or special master to take and report the testimony with his conclusions of law and fact. These unauthorized appointments of vice-chancellors cause delay and expense, and often greater evils.

3. Amend rules 26 and 27 by eliminating masters, and providing that exceptions for scandal or impertinence shall be determined by the court. They must be determined by the court in the long run, and the interposition of a master causes unnecessary expense and delay.

**Simplification of Pleadings.**—4. Modify rule 21 so as to provide that the bill, in addition to the prayer and the matters prescribed in rules 20, 22 and 23, shall contain, and contain only a statement of material facts in summary form.

5. Provide that it shall be sufficient in pleading a judgment or other determination of a court, or of an officer of special jurisdiction, or a patent, or other public grant, to allege that it was duly made or issued; that in pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part; and that it shall not be sufficient in any case herein mentioned to deny the allegation generally, but the facts relied upon must be specifically stated.

This rule is suggested, because it has been held on the circuit that it is not sufficient, in a bill for the infringement of a patent, to allege that the patent was duly issued, but that it is necessary to aver all the facts on which authority to issue the patent depends. The result is that bills in such cases are unnecessarily prolix.

6. Abolish pleas. Let all defenses be set up in the answer, giving the court power to try one or more defenses, or issues of fact, before the others.

This is the rule in most of the states, and in England. It is said that the plea of prior adjudication, statute of limitations, statute of frauds, or release may end the litigation and save further pleading, and that pleas should not therefore be abolished. Our suggestion gives the court power, according to the circumstances of each case, to try such defenses in advance, without delaying the making up of the issues.

7. Amend rule 45, which abolished special replications, also rule 66, and provide that matter in avoidance of new matter in the answer may be set up by special replication, and that such new matter shall be deemed controverted or avoided as the case may require, without further pleading.

It is proper that the defendant should be advised before trial of new matter in avoidance of matter set up in his answer. The present method of doing so by amendment of the bill is inconvenient, and causes the delay incident to the filing of an answer to the amendment.

**Discovery.**—8. Rescind rule 39, abolish bills for discovery only, and provide that all material allegations of fact, except allegations of value and amount of damages, not denied in the answer, shall be taken to be admitted except as against persons under disability. This will render exceptions to answers for insufficiency unnecessary, and enable the court to rescind rules 61, 63, 64 and 65.

9. Provide that either party, after the cause is at issue, may file interrogatories to the adverse party for the discovery of facts and documents material to the support or defense of the suit. We approve the three rules on this subject submitted by the committee of the second circuit, taken from the Massachusetts Practice Act, Rev. Laws of Mass., Ch. 173, Secs. 57 to 67

10. Provide that the amendment of rule 41, adopted at December term, 1871, shall apply to all answers under oath, whether the plaintiff in his bill waives answer under oath or not. This will abrogate the artificial rule which requires a plaintiff, who has not waived an answer under oath, to produce two witnesses or one witness and corroborating circumstances to overcome an answer under oath.

**Cross-Bills.**—11. Amend rule 72 by abolishing cross-bills for discovery only. Provide that

(2) 129 U. S. 512, 524.

cross-bills for relief may be incorporated in the answer, or filed separately; that it shall not be necessary, in either case, to set forth any of the statements in the original suit unless the special circumstances of the case may require it; that process may be served on the defendants to the cross-bill or on their solicitors; and that the pleadings to cross-bills shall be the same and follow the same course as in making up the issues on original bills.

In simple cases it will be most convenient to make the cross-bill a part of the answer, but there are complicated cases where the cross bill may become the main subject of the litigation, in which a separate cross-bill will promote clearness, avoid confusion, and facilitate the ultimate determination of the litigation on its merits. It is for this reason that we suggest that the defendant shall have the option to make his cross-bill part of his answer, or to file a separate cross-bill.

**To avoid delay in getting the cause at issue.**—12. Amend rule 2 by making the first and third Monday of every month a rule day. This retains the long established and convenient practice of stated rule days, and automatically shortens the time for all steps in the case. The time would be still further shortened, but we think unduly, if every Monday were made a rule day.

Provide that demurrers, exceptions, motions, and pleas if pleas are retained, shall be heard on the application of either party on short notice.

**Miscellaneous.**—13. Rule 68 provides that testimony may be taken in a cause "after it is at issue, by deposition according to the act of Congress." Amend by striking out the words "after it is at issue," and authorize the taking of depositions for use on the hearing of motions to grant or dissolve injunctions or for other interlocutory orders.

It has been held in some circuits that there is no power under existing rules to compel a witness to give a deposition for use at the hearing of a motion to grant or dissolve an injunction, in a case pending in another circuit. Such testimony is often of vital importance.

14. Provide that a suit improperly brought on the law or equity side may be transferrod to the proper docket and proceeded with as though originally lodged there.[3]

(3) See divided opinion of the circuit court of appeals for the eighth circuit in Schurmeier v. Connecticut Mutual Life Insurance Co., 171 Fed. 1, 7, 15.

15. We concur in the suggestions of the committee for the eighth circuit concerning the assignment of circuit judges in receiverships of property lying in two or more districts.

16. It has been proposed to abolish bills of revivor and to substitute revivor by motion and summary process, but that seems to be provided for in the case of executors and administrators by R. S. U. S., Sec. 955, and nothing can be much simpler in any case than the short bill of revivor and the proceedings thereon provided by rules 56 and 58.

LAWRENCE MAXWELL (Ohio.)
HENRY M. CAMPPBELL (Michigan.)
EDMUND F. TRABUE (Kentucky.)
J. B. SIZER (Tennessee.)

Cincinnati, Ohio, October 25, 1911.

## COMMISSION ON UNIFORM STATE LAWS—WHAT THE TWENTY-FIRST ANNUAL CONFERENCE ACCOMPLISHED.

The last session of the Commission on Uniform State Laws, which began in Boston on the 23rd and closed on the 28th of August, 1911, was notably interesting. Upwards of sixty commissioners in some instances including full delegations. This was the case with the states of Connecticut, Illinois, Michigan, New Jersey, New York, Oklahoma, Pennsylvania, Rhode Island and Vermont.

The annual address of the president, after a review of some of the more important decisions bearing upon the subject of the laws already recommended and approved by the conference, outlined various matters which seemed appropriate for uniform legislation, dwelling especially upon the diversity of the insurance and personal property tax laws.

The address explains the attitude of Great Britain and the United States on the subject of a Uniform Bills of Exchange and Promissory Notes Law of international scope. The conclusion of the committee of the conference was iden-

tical with that reached by the British and American representatives in the Hague conference on this subject, namely, that the substantial uniformity attained in the United Kingdom, British colonies and most of the states of the United States of America, without counting the vast population of the Indian Empire, made any change impracticable. As was said by the British delegate, it is possible that among the rules of English law there are some which are antiquated and inconvenient, but in its main lines our law does but incorporate the usages of our commerce. It was deemed significant and encouraging, however, that the movement for uniform laws had attained an international recognition, and the prospect seemed good that all civilized nations would at an early day recognize but two systems, one of the English-speaking people and the other of the various continental nations of Europe and South America.

The attention of the conference was occupied during its lengthy sessions by able debates upon the various committee reports, and two completed drafts of acts were added to the body of law which had already been formulated by it. These acts were the Marriage and Marriage License Acts and the Uniform Child Labor Act. The first of these acts has been under consideration for three years and it is hoped that it will meet with general acceptance among the states. It has already been ably reviewed by Professor Freund, of Chicago, who was one of the committee that presented it, in an article in the Harvard Law Review for July, 1911. The act is meant to cover regulations concerning the form of marriage contract. The most notable feature is the abrogation of common law marriages, following the general trend of legislation among the various states in this direction. The requirement of a license is made essential for the validity of the marriage. The act is a complete one within its scope, and if adopted, will solve many vexed questions and, by reason of some of its provisions, have an indirect effect in staying the tide of divorce, since they require notice and deliberation and thereby discourage thoughtless and improvident marriages.

Although all or nearly all of the states have a Child Labor Law, it is obviously important that one uniform measure should be adopted, and the bill submitted by the conference, following as it does the trend of legislation in many of the states, will be found a thoroughly sane and practicable measure.

The conference did not offer at this session any other completed measures, although tentative drafts of acts on the subjects of the law of Partnership, the Probate of Foreign Wills, the Uniform Incorporation and the Uniform Workmen's Compensation were before them and were debated with much ability and earnestness. It has been the practice of the conference never to act on any subject without a practical unanimity of opinion, and this can only be obtained by allowing abundant time for discussion and private examination of the suggested acts. Tentative drafts are drawn, and sometimes three or four years elapse before they are given to the public in their perfected form.

The conference had the advantage of listening to addresses on the subject of Child Labor, from Mr. Lovejoy, an acknowledged expert on this subject, and from Messrs. Hawes and Boston on certain aspects of the Torrens System of Land Title Registration.

So many states have adopted the Negotiable Instruments Act and a less number, but with constantly accelerating speed, the other commercial acts recommended by the conference, namely, the Sales, Stock Transfer, Warehouse Receipts and Bills of Lading Acts, that the character of the commission's work should be by this time well known to the profession. But the changing personnel of the legislatures and governors of the various states from session to session makes it important for the com-

missioners of the different states to keep the subject of uniformity and its feasibility constantly before the public, and as they are busy men, almost all being practicing lawyers or teachers of the law or in judicial office, they cannot always give the time necessary to impress upon the legislatures the importance of the work they are doing and have done.

As was said in a recent article (Boston News Bureau, September 8, 1911):

"Our dual system of government—the indestructible union of indestructible and sovereign states—was a triumph of statesmanship; but in time it has entailed inconveniences. Starting with 13, we now have 48 states much given to law-making. The natural result has been a welter of statutes, the majority of them local in bearing, but many of them putting at conflict and in confusion numerous broad relations of property and humanity that are common to all places. * * * The impulse to reform this condition has found a two-fold expression—in progressive federal centralization or in the attempt toward gradual uniformity in state laws of common bearing. The latter aspiration has been again brought to the fore by the sessions just concluded in Boston of the Commissioners on Uniform State Laws and, incidentally, of the American Bar Association, an ally in the campaign."

It cannot be doubted that a thorough understanding of the methods of the Conference of Commissioners in the various states would result in its hearty support by all of them. It has been handicapped by a lack of money, since but comparatively few of the states have made appropriations for its expenses, and there yet remain many to confer by legislative enactment the dignity of state officers upon their commissioners. When it is once known to the entire community that here is a body uninfluenced by any political bias, composed of men who are in the main experts upon the subjects with which they are called upon to deal, there will be less tendency towards that form of impatience with our constitutional system of government, which finds expression in the term "New Nationalism."

The divorce question is a case in point. From time to time the conscience of the community is aroused by some flagrant instance of marital infidelity followed by a remarriage, or some decision of the Supreme Court of the United States adjudicating in effect that a man is married to one wife in one state and to another in another state with children legitimate in one and illegitimate in another, and calls for a solution of the whole matter by an amendment to the Constitution of the United States, giving jurisdiction over the marriage relation and its sundering to the national government. This is not practicable and, if it were, would involve a complete change in our dual scheme of government. The whole problem has been solved, so far as a solution is possible with absolute divorce and the right of remarriage permitted, by the provisions of the Uniform Divorce Law formulated by the National Divorce Congress, in 1906, and accepted and approved by the Conference of Commissioners on Uniform State Laws.

It is gratifying to know that the various legal periodicals are lending their aid to the movement for uniformity through the agency of the Conference of Commissioners, and there is every evidence of continued good work by the Conference itself.

WALTER GEORGE SMITH.*

Philadelphia, Pa.

[*This article by the able president of the Commissioners on Uniform State Laws, will be received by the profession, we have no doubt, with much interest. The work which this great organization is doing is unknown to probably one-half of the American bar. It is not too much to say that, if every lawyer would give hearty support to this great agency for codification, the most important subjects of our law would soon become codified and substantially uniform throughout the states. This is the nearest practical approach to an American Corpus Juris, that we see anywhere upon the horizon.—Editor.]

## JUDGMENT-RES JUDICATA.

## OCHS v. PUBLIC SERVICE RY. CO.

Court of Errors and Appeals of New Jersey. June 11, 1911.

80 Atl. 495.

(*Syllabus by the Court.*)

When one suffers injuries to his person, and also to his property, from the same negligent act of the defendant, two distinct causes of action exist, and a recovery for the injury to the property is not a bar to a subsequent action for the injury to the person.

BERGEN, J. The plaintiff, while driving in his carriage, was run down by a trolley car of the defendant, the consequence being that the horse, wagon, and person of the plaintiff were injured. The plaintiff recovered in an action for the injury to the horse and carriage and thereafter brought suit for his personal injuries in which a motion for nonsuit was made and refused. The ground of the motion was "that the former suit, to-wit, for property damaged, was a bar to the recovery in this suit for personal injuries arising out of the same accident." The plaintiff having judgment in the second suit an appeal was taken to the Supreme Court where the judgment below was reversed and the rule applied "that a single wrongful act can give rise to but one cause of action though it may result in different injuries, or injuries to different rights, as the cause of action grows out of the act itself, and not out of its results." This rule rests primarily upon the conclusion that all injurious results from a single negligent act constitute but one cause of action, and the rule has the support of authorities entitled to serious consideration, but courts of equal learning and experience have held that there is a distinction to be made, and also that the resultant injury and not the negligent act is the ground of action.

2) As the question is now before this court for the first time, we are at liberty to adopt the rule of law which appears to us to be most logical and reasonable, and we are of opinion that there is a clear distinction between the two classes of injuries, and that it is the injury and not alone the negligent act which gives rise to the right of action, for a negligent act is not in itself actionable, and only becomes the basis when it results in injury to another. In order to support an action there must be not only the negligent act, but a consequential injury which is the gravamen of the charge, and this distinction between the negligent act and its consequences is recognized in deciding when a cause of action arises in cases where the bar of the statute of limitations is interposed. In Robert v. Read, 16 East, 215, the action was based on the throwing down of a stone wall which resulted from the wrongful act of the defendants as public officers, committed at a time so long before the wall fell as to entitle defendants to the benefit of a special act of limitation if the cause of action arose when the wrongful act was committed, and Lord Ellenborough said: "It is sufficient that the action was brought within three months after the wall fell, for that is the gravamen; the consequential damage is the cause of action in this case." Del & Raritan Canal Co. v. Wright, 21 N. J. Law, 469; Church of Holy Communion vs. Paterson Extension R. R. Co., 66 N. J. Law, 218, 49 Atl. 1030, 55 L. R. A. 81.

That our Legislature has recognized a distinction between the right to recover for injuries to property and those to the person is indicated by its course of legislation, for it has created a different period of limitation within which suits may be brought to recover damages for the respective injuries. It has made a claim for injury to property assignable, but declined to do so as to claims for personal injuries, and if the personal injury result in death, the right of action survives, by statute, for the benefit of next of kin, while the right to recover for the injury to the property is preserved for the benefit of the estate of the decedent. These divers statutes concerning limitations, assignability of rights of action, methods of enforcement, and distribution of proceeds are not consistent with a legislative intent that a single wrongful act gives rise to but one cause of action for different injuries, or injuries to different rights, such as are present in the cause under review. The enforcement of the two rights are made subject to such varying conditions that an inference may justly be drawn that the Legislature considered that there was a plain distinction between them and legislated for each from that point of view.

(1) We are of opinion that, where injury is caused to property and person by the same negligent act, distinct causes of action exist, and therefore a judgment in one cause is not a bar to an action to recover in the other. This view is supported by Brumsden v. Humphry, 14 Q. V. Div. 141, Reilly v. Sicilian Asphalt Paving Co., 170 N. Y. 40, 62 N. E. 772,

57 L. R. A. 176, 88 Am. St. Rep. 636, and Watson v. Texas & P. Ry. Co., 8 Tex. Civ. App. 144, 27 S. W. 924.

The judgment of the Supreme Court is reversed and the judgment of the district court affirmed.

NOTE.—*Injury to Person and Property from Same Accident Constituting a Single Cause of Action.*—The principal case seems opposed to the greater weight of American authority. First noticing the cases the principal case cites in its support, we will follow up with a number of cases oposed to it.

In Reilly v. Sicilian Asphalt Paving Co., *supra*, precisely the same reasoning appears as in the principal case, and the case of Brunsden v. Humphry *supra* is set forth more at large. Thus it is stated that: "Lord Justice Bowen, in the Brunsden case, has pointed out that there is no authority in the books for the proposition that a recovery for trespass to the person is a bar to an action for trespass to goods and *vice versa*. It is true that at common law the necessity of bringing two suits could, at the election of the plaintiff, be obviated in some cases—as, for instances, by declaring for trespass on the plaintiff's close, and alleging in aggravation thereof an assault upon his person. Still in such a case there would be but a single cause of action, to-wit: trespass upon the close; and if the defendant justifies this trespass, it would be a complete defense to the action; the personal assault being merely a matter of aggravation. Carpenter v. Barber, 44 Vt. 441. Therefore, for reason of the great difference between the rules of law applicable to injuries to the person and injury to property, we conclude that an injury to person and one to property, though resulting from the same tortious act, constitute different causes of action."

This reasoning carries over to our system, as it seems to us, more a technical rule, than a theory at common law of a great difference in regard to injuries to the person and injuries to property. We scarcely think, if claim for both injuries were made in one suit, that plaintiff would be held in our courts—especially in code States—merely to alleging injury to person, even in a suit for trespass upon a close, as matter of aggravation. If not, the English cases since 1776, if the suposition of difference as stated is the correct one, should not be regarded as very persuasive authority on this subject.

In Watson v. Texas Pacific Ry. Co., *supra*, it was said in speaking of the two suits that had been brought and the plea in bar of the second: "We are of the opinion that the cause of action asserted in the suit for the injuries inflicted upon the horses is not to be regarded as the same as that which is here urged. The injuries sustained in that cause and this, being the results of a common origin would have to be viewed, were it exclusively a question of damages to property, as but elements for the measurement of the damages springing from the same source; and this suit, if brought under such conditions, would be considered as an attempt on the part of plaintiff to split his demand, a practice which—especially in our system—is reprobated, with reference to actions both in contractu and ex-delicto. * * * But it seems that an exception to this rule obtains where injuries caused by the same tortious act are inflicted upon a person and also upon his property." This view is stated in Black on Judgments, section 740, which the court adopts.

Thus we see that even in a state where splitting demands is reprobated the exception is recognized.

In Lamb v. St. Louis Cable & W. Ry. Co. 33 Mo. App. 489, approved in Sims v. Chicago & A. Ry. Co., 83 Mo. App. 246, it does not apear to the court, that there is any such exception recognized as the principal case declares, but it is held that both injuries must be declared for not only in the same action but in the same count. We take it, therefore, that this court would hold there was a bar, if both were not sued for.

In Doran v. Cohen, 147, Mass. 342, 17 N. E. 647, the court held that: "Plaintiff could not legally maintain more than one action for the same tortious act. He could not divide the tort. and have one action for the injury to his property and another for the injury to his person. Bennett v. Hood, 1 Allen 47; Trask v. Hartford & New Haven Railroad, 2 Allen, 331. This is upon the ground that he could not maintain two suits for the same cause of action."

In King vs. Chicago, M. & St. P. R. Co. 80 Minn. 83, 82 N. E. 1113, 50 L. R. A. 161, the same rule against splitting up causes of action as was referred to in the Watson case, *supra*, is set out and the dissenting opinion of Chief Justice Coleridge in the Brunsden case is quoted from, which in the opinion of the Minnesota court destroyed the refined reasoning of the majority opinion. The chief justice said: "It appears to me that whether the negligence of the servant or the impact of the vehicle, which the servant drove, be the technical cause of action, equally the cause is one and the same. That the injury done to the plaintiff is injury done to him at one and the same moment by one and the same act, in respect of different rights, i. e., his person and his goods, I do not in the least deny; but it seems to me a subtlety not warranted by law to hold that a man cannot bring two actions if he is injured in his arm and in his leg, but can bring two if, besides his arm and leg being injured, his trousers which contain his leg and his coat sleeve which contains his arm have been torn." The case also refers to the text cited in the Watson case from Black on Judgments and its only authority is the Brunsden case.

In the Reilly case *supra*, which reversed the unanimous ruling of the appellate division as shown in 52 N. Y. Supp. 817, 31 App. Div. 302, several New York Court of Appeals cases are cited, one of which contains such language by Andrews Judge as that "there can be but one recovery for an injury from a single wrong, however numerous the items of damages may be, and but one action for a single breach of contract," showing that in New York there is the well established principle forbidding the splitting of causes of action. Also in one of the New York cases cited by the appellate division, Howe v. Peckham, 6 How. Prac, 229, this language was used: "The running against the plaintiff's carriage in the highway and breaking it and upsetting the plaintiff and injuring him, by the care-

less negligence of the defendant, never constituted but one cause of action."

In Bliss v. New York C. & H. R. R. Co. 160 Mass. 447, 36 N. E. 65, the Doran case *supra* is reaffirmed, as well as other Masachusetts cases to the same effect. But the rule was held not to preclude an action by plaintiff for injuries to his person, where he had accepted payment for injuries to his clothing, injured in the same accident. The court said: "The defendant contends that accepting payment for a part of the injury which he sustained and retaining the money, debars the plaintiff from maintaining his action for the other part of his injury, just as the recovery of judgment would debar him. But there are good reasons for holding the contrary doctrine. If one sues to recover for an injury, he may be well held to include in his action all he is entitled to sue for in respect to that cause of action. But, if one is making a settlement, the same reasons do not apply, and if he cannot make a full settlement he may make a partial one, and thus eliminate one element out of the controversy." Therefore it was held tender was not necessary as a condition to suing for what was not embraced in the settlement.

As also being opposed to the principal case may be cited Baltimore & O. R. Co. v. Ritchie, 31 Md. 191; Chicago West. Div. R. Co. v. Ingraham, 131 Ill., 659, 23 N. E. 350; Braithwaite v. Hall, 168 Mass. 38, 46 N. E. 398. Other cases hold the law will not compel the plaintiff to bring two suits. Pittsburg C. C. & St. L. R. Co. v. Carlson (Ind. App.) 56 N. E. 251; Seger v. Barkhamsted, 22 Conn. 295. These under the principle, that a defendant is entitled to his peace and that there should be an end of litigation ought to require but one suit, for if one may bring only one for all his damages he ought to be thus compelled.

It would seem, that the principal case and those with it, rest upon very scant authority—all English and a great while after English decision had any binding force upon us, and we do not know that recent English construction of the common law should carry any more weight than equally well reasoned American cases. There may be also something in our jurisprudence or policy that may not so readily accept the refinement that would create an exception, distinctly conceded to be such. C.

## CORRESPONDENCE.

### AN APPRECIATION OF OUR CONTRIBUTION TO THE LITERATURE ON THE SUBJECT OF THE INITIATIVE, REFERENDUM AND RECALL.

St. Johns, Oregon, Oct. 7, 1911.

Editor Central Law Journal:

I feel certain of the correctness of my statement when I say: That the Journal is now recognized by the profession generally, both East and West of the Mississippi, as the best, most up-to-date and reliable legal publication in the United States; consequently, the Journal is in a better position than any other publication to be of great assistance to the Supreme Court of the United States to aid that body in arriving at correct conclusions as to the constitutionality of the Initiative as the same is written in the Oregon Constitution and Constitutions of several of the other states—the constitutionality of which question is soon to be passed upon. I trust the Journal can see its way clear to go through its files and combine in one volume all the numbers containing articles on the Initiative, Referendum and Recall, from first to last, both pro and con, and place the same before the United States Supreme Court with the compliments of the Journal—calling the court's attention to each article for and against.

The question: "Is the Initiative constitutional?" is of national importance, and it is to be hoped that the Supreme Court will not render a cowardly opinion nor dodge the issue by saying that it is a question for Congress to settle, and thereby leave the question as a disturbing political factor of the United States. The series of articles that have recently appeared in the Journal have shed more light on the question than all other articles in all other journals combined, and it is to be hoped that the Journal can see its way clear to place these articles in the hands of the Chief Justice, pro bono publico.

Yours truly,

D. C. LEWIS.

St. Johns, Oregon.



## BOOK REVIEWS.

### GROSS' CRIMINAL PSYCHOLOGY.

Criminal Psychology, by Hans Gross, J. U. D. Translated from the Fourth German Edition by Horace M. Kallen, Ph. D. Boston. Little, Brown & Co. 1911.

This is the second book of the Modern Criminal Science Series, published by the American Institute of Criminal Law and Criminology, and is a very distinct addition to American juristic literature.

The translation is generally good, and contains very few Germanisms, but occasionally the breaking up of long and ponderous periods of the German original has led to rather careless, and in places ungrammatical and obscure English.

The translator has, almost universally, given the "Jurist" of the original as lawyer. While this cannot be said to be wrong, still in English we most often understand by lawyer, the practising lawyer, while Jurist in German has no such meaning, but is rather used as a general term in contradistinction from the special terms of Rechtsanwalt, Advokat (attorney) and Richter (judge). If the word jurist had been used in the translation in all places where it is employed in the original, the author's meaning would in most cases have been better expressed.

However, the translation of such a work as Dr. Gross' book has been a very heavy task, and it having been accomplished so satisfactorily on the whole, it would be ungraceful to

lay stress on such minor criticisms as may be made.

To properly review Dr. Gross' book within the space available for the purpose in the C. L. J. is not possible. All we can do, is to call attention to the book, and to point out some of its principal characteristics.

The title of the book is "Criminal Psychology." This is, if not misleading, not full enough. It contains much more than "criminal" psychology. If the title had been "psychology of Testimony," it would perhaps have been more descriptive of what the book contains.

Dr. Gross is a man of enormous erudition, and at the same time possessed of a very clear perception of the futility of mere book learning when it comes to dealing with living souls; he sees clearly, and asserts peremptorily that the rules for the working of the human mind must not only have been learned, but must have been experienced, must have been lived by him who undertakes to apply them for the purpose of discovering the truth from testimony and evidence generally.

Observation is the author's constant demand to the examiner, and h's book is a perfect arsenal of observations with their applications to all possible conditions. Not only the number of observations is astonishing, their acuteness together with the sharpness of differentiation are equally so. This is not a book of the good old kind with one or two, or perhaps a dozen observations founded upon one or a few isolated facts (observations generally cited from some authority long since deceased), followed by an endless chain of conclusions logically drawn from them, until a whole volume has been gotten up. No, it is a collection of numberless observations with very few sure and general conclusions drawn therefrom and none stated in dogmatic form, but with infinite pointing out of the value of each observation.

The author himself complains that we jurists have allowed ourselves as a profession, and our science to lag behind, until we are, more or less, like the quacks of the medical profession of former times. None of us can probably read this book without a sense of shame over the crudeness of our culture, both general and special: of the absolute barrenness of most of our highly prized rules of evidence; of the narrowness and coarseness of the way in which most of us try to entice the truth out of witnesses. And when we come to realize, that often we do not care over much, whether we get the truth or not, if only what we get will put us right with the jury, we must, indeed, if candid, confess that we are but quacks and dealers in patent medicines.

Dr. Gross was for a number of years judge of criminal courts, and under a system fundamentally different from ours, which made him conduct the preliminary "Untersuchung;" a sort of juge d'instruction. As such it was much easier for him to assume an impartial position, than it is for one of us having a client to defend (civilly or criminally) or a claim of a client to press. But it is our gain that he has been in such an impartial position, as thereby he has become able, in all cases to give us all the contras as well as all the pros.

It would be entirely wrong to attribute any pessimism to Dr. Gross; on the contrary, a sane, sober, even optimism runs through his book; but on the other hand, his general estimate of mankind, and of the motives which make it act, is rather low. But perhaps this tendency to look down upon mankind in general, is to be explained as a sort of reflex action from the special German "Professor Arroganz" of which even this book shows occasional signs.

Every lawyer should read this book, and most of us ought to own it. We may take exception to various of the author's conclusions, but there cannot be any doubt that this book is a storehouse of psychologic knowledge with guides to its application, not contained in any other book adapted for the use of lawyers.

It is no easy book to read, however, no vacation literature. It requires the reader's full attention, and can be assimilated in moderate doses only. But once begun, it will hold the reader's attention until he is through, and he will then feel that it—to use a hackneyed expression—is an education in itself. And he will add it to his library, and learn that he will have use for it in his practice every day of the year.

A. T.

Philadelphia, Pa., September, 1911.

## HISTORY OF AMERICAN BAR.

Mr. Charles Warren, of the Boston Bar, has published a volume under the above title which goes back to the 17th century, and treats of legal conditions as well prior to the American Revolution as down to the year 1860.

The work is not only valuable to the legal student, but to the student of history, treating as it does so many questions as sidelights in the development of the subject. Thus it is shown how the common law was applied by the courts in colonial days, how courts were appointed, legislation affecting the legal profession, the incidents in the careers of leading lawyers, and especially the prejudices surrounding them.

These prejudices, however, appear to have become more insistent after the Revolution than they were before, and why this was so may have been in the activity of the lawyer in putting to a test the new principles to which our system gave rise.

The growth of the American bar from the foundation of the Supreme Court, and the widespread interest attracted to the eloquence of leaders like Pinckney, Webster and Wirt in cases, in which Marshall and his associates were expounding the constitution, are particularly interesting phrases in this so different an age.

Great questions before our great tribunal may be as ably presented as then, but the method of presentation are as unlike as day and night, and the outcome is regarded in a wholly different way. Now decisions represent phases in conditions. Then they were determinative of conditions themselves. There is nothing in our day like the intensity of feeling about what the Supreme Court, in the old days, had to say to be compared with it, except as it may be stirred up in a political campaign, and when the campaign is over this intensity ceases.

Decision may be formative now, but it is either along lines, commercial or material in their aspect, or the habit of the people places

them in that category. Our patriotic harp seems "hung on Tara's walls," and feels the old pulse "no more."

Mr. Warren's book is in one octavo volume in cloth with gilt top, contains nearly 600 pages, is written in attractive style and is published by Little, Brown & Company. Boston. 1911.

## BOOKS RECEIVED.

The Liability of Railroads to Insterstate Employees. A Study of Certain Aspects of Federal Regulation of the Remedy for Death or Injury to Employees in the Service of Interstate Railroads, By Philip J. Dougherty of the Boston Bar. Price $3.00. Boston, Mass. Little, Brown & Co. Review will follow.

Proceedings of the Illinois State Bar Association. Semi-Annual Meeting, Springfield, February 16, 1911. Thirty-fifth Annual Meeting. Champaign-Urbana. June 23 and 24, 1910. Edited by John F. Voigt, Secretary. Published by Author.

Vol. 38 Cyc. of Law and Procedure. Tenancy in Common to Trustor. William Mack, Editor-in-Chief. Price, $7.50. New York City. American Law Book Co. Review will follow.

American State Reports, Vol. 139, Containing the Cases of General Value and Authority, Subsequent to those Contained in the "American Decisions," and the "American Reports," decided in the Courts of Last Resort of the Several States; Selected, Reported and Annotated by the Associate Editors of the late A. C. Freeman. Price, $4.00. San Francisco, Cal. Bancroft-Whitney Company. Review will follow.

## HUMOR OF THE LAW.

A young disciple of Blackstone, in the not very remote past, hung out his shingle as an attorney and counselor at law, in the shire town of a rural county, where he had neither kith nor kin to recommend or vouch for his integrity and ability, and so he must depend upon his native talent and ability, and that fickle goddess which we call "fortune," for whatever measure of success that should fall to his lot.

He believed in sartorial effect and wore appropriate apparel, and he had a manly, straightforward manner that presaged success if his mental calibre proved to be of the requisite weight; his youthful appearance, however, was brought forward as an objection against him by his detractors and the busy bodies of the town, who called attention to his youth and air of assurance, as they termed his manly bearing. Then, never before, had a young man located at the county seat at the outset of his career; it was against precedent; all other limbs of the law had won their spurs in the outlaying towns before essaying practice at the county seat; he must be taught his place, and so, a test of his ability should be made in a way that would imperil no one save the subject of the test.

A gathering, composed of the elite, the wiseacres, the busybody, and with regret, I mention the older members of the craft, was quietly arranged to be held in front of one of the leading mercantile houses of the place, which the young lawyer passed in going to his office, so that he should be taken quite unaware of the intended test, as they expressed it, but intended humiliation, best described their purpose.

It was arranged, that the senior member of the mercantile firm should open the discussion with him, in order to avoid seeming pre-arrangement, and then he was to give way to his junior partner, who was noted as the boss harrier and wit of the town, who was to put on the finishing touches to the ordeal.

If the young lawyer acquitted himself with credit during the try out, it was decided that he should be received with open arms and become one of the elite of the town, but if not, oh, well, it did not matter, the town had existed before he came there and would probably survive after he should go into the discard.

The young lawyer, all unconscious of the arrangement, came along on his way to his office, and as he reached the scene, the senior partner stepped out from among the assembled villagers, and approaching the intended victim, began:

"C-c-can you-you-t-t-tell m-m-me-me-wh-why-why," and then suddenly stopped as if exhausted.

Those who have ever been suddenly confronted by a pronounced stutterer, will realize how thoroughly and completely they can be disconcerted at witnessing the facial contortions and mental convulsions of a stutterer in endeavoring to make himself understood; and how our natural dignity and reserve ever ready to be asserted, will relax when the other proves to be crippled in speech or body, and the sympathy for affliction inherent in the human heart will at once disarm suspicion and distrust, and leave us totally unprepared to analyze or resist other impressions, and such was the purpose in this instance.

As the voice of the senior partner ceased, the junior stepped forward, smiling and suave in manner, and said: "Excuse me, sir, we saw you at Divine service last Sunday morning, and we noticed that you paid marked attention to the parson's sermon on Balaam's ass; we, of course, heard the parson's version of the text, but, unhappily for us laymen, theology and logic do not always run on parallel lines; we are perplexed and would have the doubt removed. We have been informed that you are well grounded in the occult science of applied logic, and would be pleased to have you construe that part of the sermon from the standpoint of a logician.

"My partner stutters dreadfully when under excitement, and this question has made him quite beside himself, sir, but what he wanted to speak to you about, related to the parson's sermon; he would like to know your version of 'why Balaam's ass spoke?'

"Quite simple and demonstrable, sir," unhesitatingly replied the young lawyer, who had comprehended the situation before the stutterer had finished.

"Balaam was a stuttering man, and his ass spoke for him."

## WEEKLY DIGEST.

**Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.**



1. **Abatement and Revival**—Power of Court.—That the court permitted amendment of a plea in abatement filed after time did not deprive the court of the power, in its discretion, to strike the plea on plaintiff's motion made as soon as the plea was amended.—St. Louis & S. F. R. Co. v. Sutton, Ala., 55 So. 989.

2. Removal of Cause.—Pendency in a state court of a prior action between the same parties for the same cause held no ground for abatement in a subsequent action in a federal court where no conflict arises between the courts over the custody of the property.—McClellan v. Carland, C. C. A., 187 Fed. 915.

3. **Adverse Possession**—Color of Title.—A deed may serve as color of title notwithstanding it does not so describe the land claimed, as from it alone the land can be identified.—Hardy v. Randall, Ala., 55 So. 997.

4.——Intent.—One intending to hold only to the line of her lot, though in possession of part of a street, did not hold that ground adversely.—City of Maysville v. Truex, Mo., 139 S. W. 390.

5. **Bankruptcy**—Good Will.—The good will of a business is transferable in bankruptcy proceedings, though such transfer does not prevent the former owner from competing with the transferee exactly as if he were a stranger.—James Van Dyk Co. v. F. V. Reilly Co., 130 N. Y. Supp. 755.

6.——Salary of Corporate Officer.—An officer of a corporation is not entitled to prove a claim for salary accruing after the bankruptcy of the corporation.—In re Dr. Voorhees Awning Hood Co., D. C., 187 Fed. 611.

7. **Banks and Banking**—Set-Off.—A banker may not set off a claim against a depositor unless the claim is certain and liquidated.—Tallapoosa County Bank v. Wynn, Ala., 55 So. 1011.

8. **Bills and Notes**—Attorney Fees.—Provision for attorney's fees held not to affect the negotiability of a note.—Mackintosh v. Gibbs, N. J., 80 Atl. 554.

9.——Burden of Proof.—In an action on a note, the burden was upon defendants to prove their affirmative defenses that it was obtained by fraudulent representations, breach of warranty, and the fraudulent procuring of possession of the note.—Citizens' Savings Bank v. Houtchens, Wash., 116 Pac. 866.

10.——Invalidity of Check.—One receiving a corporate check in payment of the individual debt of an officer held prima facie charged with notice that the officer is not authorized to use the corporate funds.—Coleman v. Stocke, Mo., 139 S. W. 216.

11.——Surety.—The liability of a surety on a statutory bond cannot be enlarged by implication.—C. H. Albers Commission Co. v. Spencer, Mo., 139 S. W. 321.

12. **Brokers**—Agency.—An agency confined to acceptance of a fixed price and delivery of the property sold does not impose upon the agent the strict liabilities toward his principal attaching when one gives another power to exercise full judgment and discretion in selling property.—Clubb v. Scullin, Mo., 139 S. W. 420.

13. **Carriers of Goods**—Burden of Proof.—An initial carrier, in an action for loss of baggage, has the burden of showing that the contents of the trunk had not been stolen while the baggage was in its possession.—Georgia S. & F. Ry. Co. v. Du Bose, Ga., 71 S. E. 945.

14.——Delay.—To charge a carrier of freight for special damages resulting from delay in transportation, held unnecessary that local agents have notice of special purpose of the shipment.—Gulf, C. & S. F. Ry. Co. v. Nelson, Tex., 139 S. W. 81.

15.——Lien for Charges.—Consignee cannot recover goods in trover from carrier where he refuses to pay charges.—Louisville & N. R. Co. v. Southern Flour & Grain Co., Ga., 71 S. E. 884.

16 **Carriers of Passengers**—Alighting Passenger.—Where a street car stops at an unusual place, inviting passengers to alight, it is the carrier's duty not to start it suddenly, so as to endanger the safety of alighting passengers.—Coyle v. People's Ry. Co., Del., 80 Atl. 638.

17.——Assisting Passenger.—The duty to assist passengers boarding trains carries with it, under reasonable circumstances, the duty to assist a lady traveling with heavy hand baggage—Hasbrouck v. New York Cent. & H. R. R. Co., N. Y., 95 N. E. 808.

18.——Contributory Negligence.—Where a street car passenger unnecessarily stands on the platform, and is thrown off the car, he is guilty of negligence, precluding recovery.—File v. Wilmington City Ry. Co., Del., 80 Atl. 623.

19. **Common Carrier**—Drayman.—A drayage and transfer company held a common carrier.—Model Clothing Co. v. Columbia Transfer Co., Mo., 139 S. W. 242.

20. **Constitutional Law**—Corporations as Persons.—Corporations are "persons" within the protection of the fourteenth amendment to the United States Constitution, requiring the equal protection of the law.—Ex parte Case, Idaho, 116 Pac. 1037.

21. **Contracts**—Adequacy of Consideration.—In the absence of fraud or overreaching, the

courts will not inquire into the adequacy of the consideration of a contract, but will only inquire into its legality.—Nelson v. Brassington, Wash., 116 Pac. 629.

22.——Affirmative Defense.—The defense that a written contract between the parties has been waived and that a new relation has been created is an affirmative defense, and the burden of proving it rests on the party asserting it.—Bangs v. Farr, Mass., 95 N. E. 841.

23.——Parol Evidence.—Though parol evidence is inadmissible to contradict a written agreement, it is admissible to show that surrounding circumstances that the court may construe the contract in accordance with the intention of the parties.—Luitweiler Pumping Engine Co. v. Ukiah Water & Improvement Co., Cal., 116 Pac. 707.

24.——Pari Delicto—The courts will not assist either party to a transaction forbidden by law or against public policy.—Glass v. Childs, Ga., 71 S. E. 920.

25.——Reasonable Time.—Where the terms of an agreement do not limit the time within which it is to be performed, the law implies that it is to be performed within a reasonable time.—Spaeth v. Ocean Park Realty, Mining & Investment Co., Cal., 116 Pac. 980.

26. **Corporations**—Estoppel.—A foreign corporation is estopped to assert invalidity of its mortgage through its failure to comply with statutes governing such corporations.—Contral Coal & Coke Co. v. Optimo Lead & Zinc Co., Mo., 139 S. W. 525.

27.——Estoppel.—Corporate creditors dealing with the corporation with knowledge that stock was issued for property of less value than the par value of the stock are estopped from enforcing the stockholder's liability for the unpaid part.—Davies v. Ball, Wash., 116 Pac. 833.

28.——Estoppel.—A corporation cannot recover on notes paid by it, given by its stockholders, if it adopted the notes as its own obligations and agreed to hold the makers harmless.—North Anson Lumber Co. v. Smith, Mass., 95 N. E. 838.

29.——Joinder of Parties.—Persons who were formerly stockholders in a corporation held entitled to join as complainants in a stockholders' suit on allegations showing that they were induced to part with their stock to individual defendants who control the corporation by false and fraudulent representations.—Price v. Union Land Co., C. C. A., 187 Fed. 886.

30.——Implied Power of Officer.—The president of a banking corporation held without implied power to lease the bank's real estate or cancel leases it has outstanding.—People's Bank v. Bennett, Mo., 139 S. W. 219.

34.——Insolvency.—Where the Legislature has allowed certain creditors preferential claims on assets of an insolvent corporation, equity may not allow preference to any other class.—Massey v. Camden & T. Ry. Co., N. J., 80 Atl. 557.

32.——Unpaid Subscription.—In a suit in equity by a creditor of a corporation against the shareholders whose subscriptions are unpaid, all such shareholders should be made defendants as well as the personal representatives of those who may have died.—Warth v. Moore Blind Stitcher & Overseamer Co., 130 N. Y. Supp. 748.

33. **Criminal Trial**—Former Jeopardy.—One obtaining a new trial on the ground of the unconstutionality of the jury law held estopped from pleading former jeopardy for anything growing out of that trial.—Reynolds v. State, Ala., 55 So. 1016.

34. **Dedication**—Reversion.—Property dedicated to a public use held to revert to the dedicator when the execution of the use becomes impossible.—Gaskins v. Williams, Mo., 139 S. W. 117.

35. **Deeds**—Building Restrictions.—Building restrictions in deeds are to be construed strictly against the grantor.—Firth v. Marovich, Cal., 116 Pac. 729.

36.——Future Delivery.—A deed may be delivered by the grantor to a third person for the delivery to the grantee after the grantor's death.—Terry v. Glover, M., 130 S. W. 337.

37.——Presumption as to Delivery.—A duly executed deed found among the papers of the decedent grantee is presumed to have been duly delivered.—Fish v. Poorman, Kan., 116 Pac. 898.

38.——Punctuation.—The punctuation of an instrument, such as a deed, is ordinarily of little aid in construing it.—Skamania Boom Co. v. Youmans, Wash., 116 Pac. 645.

39.——Restrictive Covenants. — Restrictive covenants in deeds as to buildings or improvements will not be enforced, where enforcement would be inequitable.—Union Trust & Realty Co. v. Best, Cal., 116 Pac. 737.

40. **Drains**—Constitutionality.—A statute cannot be assailed because it does not require a landowner to be fully informed as to the plans of drainage before the district is formed.—Little River Drainage Dist. v. St. Louis, M. & S. E. R. R., Mo., 139 S. W. 330.

41. **Easements**—Abandonment.—An easement may be lost by abandonment.—Southern Ry., Carolina Division, v. Howell, S. C., 71 S. E. 972.

42.——Platting Property.—(When an owner of land lays it out into lots with streets and alleys and sells the lots with reference thereto, purchasers of lots acquire an easement to use the streets and alleys for access which is a property right.—Blenis v. Utica Knitting Co., 130 N. Y. Supp. 740.

43. **Equity**—Cross Complaint.—That a complaint may not state a cause of action for equitable relief is immaterial on the question of jurisdiction where a cross-complaint states a cause of action clearly cognizable in equity.—Polak v. Steinke, Ark., 139 S. W. 538.

44.——Fraud.—Plaintiff purchasing stock in a corporation, with a known fraudulent scheme, held not entitled to relief in equity on the ground of fraud and deceit.—Bryan v. Miller, Mo., 139 S. W. 128.

45.——Multifariousness.—Where a bill states a good cause of action, but couples with it another cause of action, which renders it multifarious, it is error to dismiss the bill on the merits, but complainants should be given the right to replead, or on their failure the dismissal should be without prejudice.—Price v. Union Land Co., C. C. A., 187 Fed. 886.

46. **Estoppel**—Changing Attitude—A party assuming a position in a legal proceeding and succeeding may not, because his interests have

changed, thereafter assume a contrary position. —Clear Springs Water Co. v. Catasauqua Borough, Pa., 80 Atl. 566.

47. **Evidence**—Discretion of Court.—The admission of evidence of experiment is within the discretion of the trial judge.—Carolina Portland Cement Co. v. Marshall, Ga., 71 S. E. 942.

48.——Judicial Notice.—Courts will take judicial notice of general panics, as the one of 1907.—Louisville & N. R. Co. v. Holland, Ala., 55 So. 1001.

49.——Judicial Notice.—The Supreme Court will take judicial notice that section 2 of township 9, range 20, adjoins section 11 on the north.—Shivers v. Farmers' Mut. Fire Ins. Co., Miss., 55 So. 965.

50.——Judicial Notice.—Whether courts will take judicial notice of matters of fact is a matter of discretion resting on the nature of the subject, the issue involved, and the apparent justice of the case.—City of St. Louis v. Niehaus Mo., 139 S. W. 450.

51.——Meaning of Terms.—Where statements by parties in a special business or work have a special meaning among persons engaged in such business or work, it is competent for persons familiar with the usage to explain the meaning of the statements.—Southern Anthracite Coal Co. v. Hodge, Ark., 139 S. W. 292.

52.——Mortality Tables.—Mortality tables are not conclusive on the issue of life expectancy in an action for wrongful death.—Louisville & N. R. Co. v. Holland, Ala., 55 So. 1001.

53.——Surrounding Circumstances.—Whether a writing contains an entire agreement is to be determined, not merely from the face of the instrument, but from all the facts and circumstances connected with it.—Luitweiler Pumping Engine Co. v. Ukiah Water & Improvement Co., Cal., 116 Pac. 707.

54.——Suppression of Facts.—The Superior Court, in passing on facts in a divorce case, was entitled to give much weight to the fact that respondent suppressed testimony of the petitioner, and by improper methods deprived her of important witnesses.—Warren v. Warren, R. I., 80 Atl. 593.

55.——Executors and Administrators.—On a claim against an estate for personal services, decedent's granddaughter was properly permitted to show his attempted will, as corroborating evidence that decedent intended to reimburse her.—Hobin v. Hobin, R. I., 80 Atl. 595.

56. **Explosives**—Nuisance.—The maintenance of a nuisance by unlawfully storing explosives on premises held not a proximate cause of injuries to a boy who carried them away and set them off.—Bennett v. Odell Mfg. Co., N. H., 80 Atl. 642.

57. **Fixtures**—Conditional Sales.—Generators sold conditionally and installed in power plant of traction company as necessary part of the plant held a part of the realty and bound by a lien of mortgage by traction company to secure bondholders.—Bullock Electric Mfg. Co. v. Lehigh Valley Traction Co., Pa., 80 Atl. 568.

58. **Food**—Municipal Corporations.—The city of St. Louis has power to establish a milk standard in the exercise for police power.—City of St. Louis v. Scheer, Mo., 139 S. W. 434.

59. **Fraud**—Scienter.—Scienter is an essential element of actionable fraud.—Adams v. Barber, Mo., 139 S. W. 489.

60. **Fraudulent Conveyances**—Estoppel. — A grantor, conveying property for a fraudulent purpose, may not plead his fraudulent act in an action to recover the property from the grantee.—Elliott v. Landis Mach Co., Mo., 139 S. W. 356.

61. **Frauds, Statute of**—Novation. — Where there was a complete novation, the promise of one person to pay for work done at the instance of a third person, is not within the statute of frauds.—Barnett v. Rosenberg, Mass., 95 N. E. 849.

62. **Fraudulent Conveyances**—Partition in Fraud.—Both parties to fraudulent conveyances having participated in the fraud, the conveyances are void, whether voluntary or for a valuable consideration.—Gately v. Kappler, Mass., 95 N. E. 859.

63. **Garnishment**—Post Dated Check.—A drawer of a postdated check cannot be charged as garnishee of the payee unless at the time of the judgment against the garnishee the check had become due and was still the property of the payee.—Wilson v. McEachern, Ga., 71 S. E. 946.

64. **Good Will**—Business Name.—The name and style under which a partnership business has been conducted is a part of the good will. —James Van Dyke Co. v. F. V. Reilly Co., 130 N. Y. Supp. 755.

65. **Husband and Wife**—Community property is liable for a debt created by the husband for the benefit of the community, but not for a debt created by a tort of either spouse.—Milne v. Kane, Wash., 116 Pac. 659.

66. **Indictment and Information**—Pleading—Where B. aids in committing an offense, the indictment may charge them both as principals, or allege the matter according to the facts.—Maughon v. State, Ga., 71 S. E. 922.

67. **Infants**—Contracts.—That a minor has neither parent nor guardian does not give him power to contract generally.—Wickham v. Torley, Ga., 71 S. E. 881.

68. **Injunctions**—Temporary Restraining Order.—Damages suffered by the issuance of a temporary injunction subsequently dissolved held to include interest on money on deposit from the date of the injunction to the date of its dissolution in the trial court, but not thereafter pending appeal.—C. H. Alberts Commission Co. v. Spencer, Mo., 139 S. W. 321.

69. **Insurance**—Construction of Policy.—The rule that a contract of insurance will be construed most strongly against the insurer, applies to fraternal benefit insurance.—Mathews v. Modern Woodmen of America, Mo., 139 S. W. 151.

70.——False Description.—A false part of a description of the insured property may be disregarded, if sufficient remains to identify it.—Shivers v. Farmers' Mut. Fire Ins. Co., Miss., 55 So. 965.

71.——Illegal Assignment.—In an action by insured's executor on certain life policies, it was no defense that the insurer had paid the proceeds to an assignee under an assignment for moneys advanced, to be used by insured in gambling transactions in cotton futures.—Man-

hattan Life Ins. Co. v. Cohen, Tex., 139 S. W. 51.

72.——Insurable Interest.—An assignment of a life policy to one without insurable interest is valid in Texas only to the extent of reimbursing the assignee for the amount paid out by him. —Manhattan Life Ins. Co. v. Cohen, Tex., 139 S. W. 51.

73.——Right of Indemnitor.—Where loss by fire is occasioned by a railroad and exceeds the insurance, the owner, and not the insurance company, has a right to recover damages.—Shawnee Fire Ins. Co. v. Cosgrove, Kan., 116 Pac. 819.

74.——Usury.—Policy of fire insurance providing against change of ownership held not avoided by deed which is void for usury.—Athens Mut. Ins. Co. v. Evans, Ga., 71 S. E. 892.

75.——Waiver.—A fire insurer waives a stipulation limiting other insurance by collecting and retaining a premium, knowing that the stipulation has been ignored.—Rogers v. Connecticut Fire Ins. Co. of Hartford, Mo., 139 S. W. 265.

76. **Intoxicating Liquors**—Lawful Business.—The liquor traffic is not a lawful business, except as authorized by express legislation.—State v. Parker Distilling Co., Mo., 139 S. W. 453.

77. **Landlord and Tenant**—Relationship.—The failure of a purchaser of lands let into possession to make payment of the purchase money does not, in the absence of a special agreement, make him the vendor's tenant.—Bush v. Fuller, Ala., 55 So. 1000.

78.——Taxes by Whom Payable.—In the absence of a covenant to the contrary, there is an implied covenant in every lease that the lessor shall pay all taxes and assessments.—Trimble v. City of Seattle, Wash., 116 Pac. 647.

79. **Limitations of Actions**—Fraud of Agent.—Where a married woman intrusted the management of her property to real estate agents and those agents by fraud acquired the title to the property, the statute of limitations has no application to an action brought by her after the fraud was discovered.—Witte v. Storm, Mo., 139 S. W. 384.

8. **Mandamus**—Federal Courts.—The writ of mandamus is never employed in the federal courts to revise or amend the decision of an inferior court where such decision proceeds from a judicial act and is within the scope of its jurisdiction and discretion.—Barnes v. Lyons, C. C. A., 187 Fed. 881.

81.——Title to Office.—Where relator had been duly appointed and commissioned to an office and was acting as such officer and performing the duties thereof without challenge by any other person his title could not be questioned in mandamus proceedings to recover his salary.—State ex rel. Tolerton v. Gordon, Mo., 139 S. W. 403.

82. **Master and Servant**—Degree of Care.—A servant having only one limb was required to exercise more care in working around machinery than one having all his parts.—McKain v. Camden Water, Light & Ice Co., S. C., 71 S. E. 949.

83. **Mechanics' Liens**—Material to Sub-contractor.—One furnishing materials to a subcontractor held entitled to a mechanic's lien, the contractor not being fully paid, though the subcontractor has been fully paid by the contractor. —Snell v. Clark Const. Co., Cal., 116 Pac. 699.

84.——Materialman.—Millowner, sawing lumber from timber of another and delivering the lumber to the owner of the land or his agent for improvement of the real estate, held not entitled to materialman's lien for the price of sawing the lumber.—Georgia Steel Co. v. White, Ga., 71 S. E. 890.

85.——Performance of Contract.—The right of mechanics' lienors, claiming under a subcontractor, to reach funds retained to secure the contractor from loss through the subcontractor's default, depends upon substantial performance of the subcontract.—Upson v. United Engineering & Contracting Co., 130 N. Y. Supp. 726.

86.——Public Improvement.—No liens can be asserted on a tunnel constructed by a city as a public improvement.—Clark v. Beyrle, Cal., 116 Pac. 739.

87. **Monopolies**—Patented Articles.—A decree prohibiting a foreign corporation from doing business in patented articles in the state held not a violation of Const. U. S. art. 1, secs. 8, 10, Id. Amend. 14, and the acts of Congress relating to inventions and inventors.—State v. Creamery Package Mfg. Co., Minn., 132 N. W. 268.

88. **Mortgages**—Surplus Money.—A set-off for use and occupation of premises in excess of a share of the one in possession may be made in proceedings to determine the rights to surplus money in a mortgage foreclosure.—Shueler v. Levy, 130 N. Y. Supp. 600.

89. **Municipal Corporations**—Special Assessment.—It cannot be determined as a matter of law that the opening of a new street did not benefit petitioner's property, so as to preclude an assessment.—Leahy v. Charles, Mass., 95 N. E. 834.

90. **Negligence**—Imputability.—Contributory negligence of a father is not imputed to his infant child, and will not defeat the right of the child to recover for personal injuries negligently inflicted.—Nashville Lumber Co. v. Busbee, Ark., 139 S. W. 301.

91.——Imputability.—Negligence of a driver is not to be imputed to one riding with him.—Ewans v. Wilmington City Ry. Co., Del., 80 Atl. 634.

92.——Licensees.—An owner of a public bowling alley must exercise reasonable care so as not to injure persons when using the alley as reasonably contemplated.—Stelter v. Cordes, 130 N. Y. Supp. 688.

93.——Presumption.—There is no particular age at which a minor is presumed to be able to comprehend risks or to be capable of negligence. Berdos v. Tremont & Suffolk Mills, Mass., 95 N. E. 876.

94.——Proximate Cause.—The "proximate cause" of a negligent injury is a want of ordinary care which actively aids in directly producing an injury.—A. Cohen & Co. v. Rittimann, Tex., 139 S. W. 59.

95. **Nuisance**—Business Competition.—That defendant unlawfully conducts a general hacking business does not show a nuisance abatable on suit by a competitor.—Hefferon v. New York Taxicab Co., 130 N. Y. Supp. 710.

96. **Partnership**—Joinder of Parties.—That a complaint in an action on a note joined too

many persons as defendant partners does not prevent recovery against the actual partners.—Alaska Banking & Safe Deposit Co. v. Van Wyck, 130 N. Y. Supp. 563.

97.——Receivership.—Earnings by a receiver after the dissolution of a firm held applicable with other assets to capital and profits according to the proportion the capital bore to the ascertained profits.—Kennedy v. Hill, S. C., 71 S. E. 974.

98. **Principal and Agent**—Limit of Agency.—Mere authority to lease premises and collect the rentals held not to include authority to accept a surrender of the lease.—Theo. Hamm Brewing Co. v. Wiggam, S. D., 132 N. W. 270.

99.——Ratification.—Ratification need not be express, but may be implied from conduct on the part of the principal reasonably tending to show an intention to ratify the acts of the alleged agent.—Union Trust & Realty Co. v. Best, Cal., 116 Pac. 737.

100. **Principal and Surety**—Defénce Against Note.—A surety upon a note cannot escape liability on the ground that the liability of other sureties upon the note was limited by a parol agreement.—Milan Bank v. Richmond, Mo., 139 S. W. 352.

101. **Process**—Constructive Service.—A statute providing for substituted or constructive service of process is strictly construed.—Priest v. Capitain, Mo., 139 S. W. 204.

102. **Railroads**—Discovered Peril.—Though an engineer, after seeing a person asleep on the tracks, did everything in his power to avoid injury, that would not exculpate the railroad, unless his effort was such as prudent and skillful men in his station would have made.—Louisville & N. R. Co. v. Holland, Ala., 55 So. 1001.

103.——Track as Footway.—Where the general public have been invited to use a track by tacit consent and long acquiescence, it is the duty of the railroad company to use ordinary care to protect pedestrians from being run down and injured.—Ervin v. St. Louis, I. M. & S. Ry. Co., Mo., 139 S. W. 498.

104. **Reformation of Instruments**—Mutual Mistake.—A written instrument cannot be reformed for mistake unless the mistake is by both parties.—Waslee v. Rossman, Pa., 80 Atl. 643.

105. **Sales**—Duty of Purchaser.—A buyer of an English edition of a literary work need not accept an American reprint.—Birdsall v. Coon, Mo., 139 S. W. 243.

106.——Evidence.—Defendant claiming rescission of a contract for the sale of a pump, its president was entitled to testify that he relied on the representations in plaintiff's catalogue in making the purchase.—Luitweiler Pumping Engine Co. v. Ukiah Water & Improvement Co., Cal., 116 Pac. 707.

107.——Instalment Payments.—A buyer of articles for delivery in installments held entitled on discovering defects in the articles to refuse to go on with the contract.—Bobrick Chemical Co. v. Prest-O-LLite Co., Cal., 116 Pac. 747.

108.——Misrepresentation.—Purchaser held not entitled to avoid sale for misrepresentations of the seller as to matters in regard to which the means of knowledge were at hand and equally available to both parties.—Miller v. Roberts, Ga., 71 S. E. 927.

109.——Tender.—Where a vendor without delivery or tender sells the goods previously sold to a third person, the vendee need not tender price to put vendor in default.—Gruen v. George A. Ohl & Co., N. J., 80 Atl. 547.

110.——Time of Essence.—Time is of the essence of an option contract and prompt performance by the holder of the option must be tendered.—Cantwell v. Johnson, Mo., 139 S. W. 365.

111.——Reasonable Value.—Where no contract is made to purchase property delivered to and accepted by the buyer, he is liable to the seller for the reasonable value thereof.—Speakman v. Price, Del., 80 Atl. 627.

112.—Rescission.—Where a buyer, with knowledge that a steam plow was not a new one such as he had bought, accepted the plow, he has no right to rescind.—Geiser Mfg. Co. v. Lunsford, Tex., 139 S. W. 64.

113.——Right of Inspection.—Until an article bought under an agreement that it is reasonably fit for the use for which it was sold is inspected, the buyer's acceptance is not required.—S. F. Bowser & Co. v. Kilgore, Ark., 139 S. W. 541.

114. **Specific Performance**—Option Contract.—An option contract based on a valuable consideration held an exception to the rule that, if a contract cannot be specifically enforced against one seeking performance, he cannot enforce it against his adversary.—Naylor v. Parker, Tex., 139 S. W. 93.

115.—Wills.—An agreement between legatees and a contestant of a will that the latter shall have a certain specific share of the estate is enforceable by proceeding in equity for specific performance.—Baxter v. Stevens, Mass., 95 N. E. 854.

116. **Taxation**—Exemptions.—Since taxation is necessary to the existence and continuance of government, there are no implied exemptions from its burdens.—Trimble v. City of Seattle, Wash., 116 Pac. 647.

117.——Uniformity.—A statute which imposes a tax under the taxing power on persons, property or any lawful business, is invalid where it is not uniform in its operation.—State v. Parker Distilling Co., Mo., 139 S. W. 453.

118. **Tenancy in Common**—Joint Cause of Action.—Tenants in common in a prospective crop held to have a joint cause of action against one who sells to one of them seed wheat unfit for use, whereby they lose the crop.—Fuhrman v. Interior Warehouse Co., Wash., 116 Pac. 666.

119. **Trover and Conversion**—General Denial.—In a suit for conversion, anything tending to disprove plaintiff's averment of right to possession was available under a general denial.—Summers v. Baker, Mo., 139 S. W. 226.

120. **Trusts**—Constructive Trust.—One who advanced money for another to purchase real estate, and took the legal title in his own name as security, held to be a trustee for the borrower.—Scott v. Ferguson, Mo., 139 S. W. 102.

121.——Notice to Purchasers.—While those who purchase in good faith for value and without notice, from a trustee in the actual possession of the trust estate, and with authority to sell, take trust property with the title discharged from the trust, purchasers not in good faith take the property subject to the trust.—Witte v. Storm, Mo., 139 S. W. 384.

122. **Usury**—Right to Show.—Transfer of policy pending suit to secure debt to secure which a deed was given by insured after issuance of policy held not to prevent insured from showing the deed to be void for usury.—Athens Mut. Ins. Co. v. Evans, Ga., 71 S. E. 892.

123. **Vendor and Purchaser**—Marketable Title.—An agreement to convey land free and clear from taxes, mortgages, and other liens held not complied with where an easement to maintain water pipes or ditches existed.—Wingard v. Copeland, Wash., ———

124.——Caveat Emptor.—The doctrine of caveat emptor does not apply to a contract for the purchase of land situated in another state, the purchaser not having an opportunity to examine.—Adams v. Barber, Mo., 139 S. W. 489.

125.——Specific Performance.—Specific performance of a contract to exchange lands is properly denied when plaintiffs have overreached defendants.—Jones v. Hawk, Wash., 116 Pac. 642.

126——Vendor's Lien.—One having a vendor's lien upon land is not entitled to have a personal judgment against a subsequent incumbrancer, the land alone being liable for the vendor's lien.—First State Bank of Teague v. Cox, Tex., 139 S. W. 1.

127. **Wills**—Construction.—A power of sale in a will does not generally authorize the person to whom it is granted to incumber the devised property.—Dewein v. Hooss, Mo., 139 S. W. 195.

128.——Undue Influence.—That a will is unnatural is not of itself ground for rejecting it, but can be considered only when coupled with facts of undue influence or testamentary capacity, when the will is contested on such grounds.—Turner v. Anderson, Mo., 139 S. W. 180.

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## CONTENTS.